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Marilyn May
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7-1-19

Re: Burnett v. Martinezes v. GEICO
Supreme Court Nos. S-17041 and S-17132

MARTINEZES' SUPPLEMENTAL AUTHORITY

These Supplemental Authorities relate to GEICO's failure to produce an adequate expert report by Dave Nyman of Restoration Science & Engineering and the general course of proceedings. It is addressed in the Martinezes' Reply Brief in Footnote 2 at page 4 and in Footnote 3 at page 20 as well as other places.

1. **Mathis v. Hildebrand, 416 P.2d 8 (Alaska 1966)** discusses the timing of discovery, and encourages early discovery stating:

"Courts commonly hold that the plaintiff waives the [physician patient] privilege when he voluntarily testifies concerning the injuries being sued upon. Increasingly it is being held that common sense dicates against enforcing the privilege until it has actually been waived during trial, as it almost invariably must be, and then in

fairness being required to grant the defendant's request for a continuance to meet the new matter disclosed.

We are convinced that a rigid enforcement of the privilege under the facts of this case would serve no useful purpose and might result in injustice."

2 **State v. Leach, 515 P.2d 1383, 1385 (Alaska 1983)** held that the *"promulgation of the new civil discovery rules in February, 1973, was not intended to signal any retreat from our previous preference for liberal construction of Alaska's discovery rules or to in any way modify or undercut our rejection in Miller [v. Harpster, 392 P.2d 21 (Alaska 1964] of 'unfairness contentions.'"* The Court then discussed **United States v. Meyer, 398 F. 2d 66 (9th Cir. 1968)**, which concluded that condemnation cases possessed a uniqueness justifying discovery from potential expert witnesses. The Court quoted Judge Browning's observation that: *"Appraisers not called as witnesses may have discovered facts, applied techniques, or arrived at opinions which, though not acceptable to the government, were nevertheless relevant to the subject matter of the litigation and helpful to the landowner. It would be intolerable to allow a party to suppress unfavorable evidence by deciding not to use a retained expert at trial."* In note 11 the Court quoted Chief Justice Ervin in **Pinellas County v. Carlson, 242 So. 2d 714, 720 (Fla. 1970),** *"...disclosure in a condemnation case of the information possessed by an adverse party's appraiser no doubt comports with the overriding purpose of our procedural rules 'to secure the just, speedy and inexpensive determination of every action'"* The Alaska Supreme

Court commented *"The goal in a condemnation proceeding is the payment to the condemnee of 'just compensation' and not the withholding of relevant information to enhance the government's position in litigation."* The other Alaska precedent that the *Leach* decision relied on (at page 1386) was ***Security Industries, Inc. v Fickus, 439 P.2d 172 (Alaska 1968).*** The *Leach* decision described *Fickus* as follows:

"Subsequently, in Fickus, this court had to resolve a dispute concerning a Civil Rule 34 order which required production of all written reports in the possession of the parties 'concerning any examination, testing, operation or observation' of a particular vehicle camper unit. In Fickus, we held that the policy goals behind our discovery rules required the conclusion that the good cause requirement had been met....Given Miller and Fickus, the unique character of the normal condemnation proceeding, the nature of the discovery shought, and our previous interpretations of the requirement of a showing of good cause for discovery, we hold that in the case at bar the 'exceptional circumstances' requirement of Civil Rule 26(b)(4)(B) was met. We therefore affirm the superior court's order."

3 In **Todeschi v. Sumito Metal Minin Pogo, LLC, 394 P.3d 562 (Alaska 2017)** the Court said at note 46: *We recognized a medical care provider's duty to create and preserve medical records in* ***Patrick v. Sedwick, 391 P.2d 453, 457 (Alaska 1964)*** *(holding that a surgeon "was obligated to his client to prepare" a report that "described accurately and fully ... everything of consequence that he did and which his trained eye observed during the operation").* In *Patrick v. Sedwick* at page 458

the Court concluded: "*We shall not permit the absence of personal recollection or of recorded facts to serve as a defense under the circumstances of this case.*"

4 **Settlement.** The above referenced principles are not just meant to arm warriors engaged in a sporting contest. *Miller v. Harpster* made that clear at page 23: Two of the Court's statements are:

"The requirement of a showing of good cause should not be given a strict or technical interpretation. At least where the request for production pertains only to written statements. It should not be necessary for opposing counsel to show that the witnesses are no longer available or that additional statements could not be obtained except at a great expenditure of time and money. The information contained in the statements of the eyewitnesses belongs to both parties to the dispute. The sooner both parties are aware of the observations of the witnesses, the sooner the litigation can proceed along the usual lines toward settlement or trial."

.....

"The broad policy of all of our rules permitting discovery is to eliminate surprise at the trial and to make it convenient for the parties to find and preserve all available evidence concerning the facts in issue, thereby encouraging the settlement or expeditious trial of litigation."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email this 1 day of July, 2019 on:

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